FEB 18 1967
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1075

LESLIE D. STICKLER,
Petitioner,

v.

DAN TEHAN,
Sheriff of Hamilton County, Ohio,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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LESLIE D. STICKLER,

Petitioner,

v.

DAN TEHAN,
Sheriff of Hamilton County, Ohio,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on August 19, 1966, affirming the denial of petitioner's petition for writ of habeas corpus by the United States District Court for the Southern District of Ohio, Western Division.

CITATIONS TO OPINIONS BELOW.

The district court entered judgment denying the petition for writ of habeas corpus on August 6, 1964, with memorandum opinion and order.[1]

The opinion of the Sixth Circuit Court of Appeals, printed in Appendix A of the separately printed Appendix hereto, p. 1a, is reported in 365 F. 2d 199 (6th Cir. 1966).

[1] R. 647a.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered in the subject cause on August 19, 1966. Appendix A, page 8a. Upon petitioner's timely application, the time within which petition for certiorari might be filed was extended by this Court from December 20, 1966 until February 18, 1967. The jurisdiction of this Court is invoked under Title 28, U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I.

Where, in a state criminal prosecution for failure to comply with the registration requirements of the Ohio Securities Law in transferring two promissory notes to a single creditor, the trial community was inundated with publicity in the news media, both before and during the trial, implicating the accused in a massive fraud and swindle involving vast numbers of victims and millions of dollars, of which the transaction in issue represented only the most minute part, and where, during the empanelling of the jury, the trial community was further inundated with publicity in the news media describing the mysterious disappearance and subsequent violent death of an accountant, under separate indictment for his role in the broad financial scheme, who was expected to be a damaging witness against petitioner, did the trial court's denial of defense motions for continuance and change of venue in the face of such inflammatory and prejudicial publicity deprive petitioner of a fair trial before an impartial tribunal in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

II.

Where, in a state criminal prosecution for failure to comply with the registration requirements of the Ohio Securities Law in transferring two promissory notes to a single creditor, the trial community was inundated with publicity in the news media, both before and during the trial, implicating the accused in a massive fraud and swindle involving vast numbers of victims and millions of dollars, of which the transaction in issue represented only the most minute part, and where, during the empanelling of the jury, the trial community was further inundated with publicity in the news media describing the mysterious disappearance and subsequent violent death of an accountant, under separate indictment for his role in the broad financial scheme, who was expected to be a damaging witness against petitioner, did the trial court's refusal to permit detailed defense interrogation of potential jurors on voir dire to elicit their attitudes as to the effect of such publicity upon their impartiality, deprive petitioner of a fair trial before an impartial tribunal in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

III.

Where, in a state criminal prosecution for failure to comply with the registration requirements of the Ohio Securities Law, in transferring two promissory notes to a single creditor, the trial community was inundated with publicity in the news media, both before and during the trial, implicating the accused in a massive fraud and swindle involving vast numbers of victims and millions of dollars, of which the transaction in issue represented only the most minute part, and where during the empanelling of the jury, the trial community was further inun-

dated with publicity in the news media describing the mysterious disappearance and subsequent violent death of an accountant, under separate indictment for his role in the broad financial scheme, who was expected to be a damaging witness against petitioner, did the trial court's refusal to permit detailed interrogation of the empanelled but unsequestered jurors as to the prejudicial effect of a television broadcast by the attorney who represented the accountant, exonerating his client but implicating petitioner, deprive petitioner of a fair trial before an impartial tribunal in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

IV.

Where, in a state criminal prosecution for failure to comply with the registration requirements of the Ohio Securities Law in transferring two promissory notes to a single creditor, the trial community was inundated with publicity in the news media, both before and during the trial, implicating the accused in a massive fraud and swindle involving vast numbers of victims and millions of dollars, of which the transaction in issue represented only the most minute part, and where, during the empanelling of the jury, the trial community was further inundated with publicity in the news media describing the mysterious disappearance and subsequent violent death of an accountant, under separate indictment for his role in the broad financial scheme, who was expected to be a damaging witness against petitioner, did the trial court's refusal to permit reinterrogation of the empanelled but unsequestered jurors immediately after extensive publicity in the trial community concerning the discovery of the dead body of the accountant and speculation implicating petitioner in his mysterious and violent death, de-

prive petitioner of a fair trial before an impartial tribunal in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

V.

Where, in a state criminal prosecution for failure to comply with the registration requirements of the Ohio Securities Law in transferring two promissory notes to a single creditor, the trial community was inundated with publicity in the news media, both before and during the trial, implicating the accused in a massive fraud and swindle involving vast numbers of victims and millions of dollars, of which the transaction in issue represented only the most minute part, and where, during the empanelling of the jury, the trial community was further inundated with publicity in the news media describing the mysterious disappearance and subsequent violent death of an accountant, under separate indictment for his role in the broad financial scheme, who was expected to be a damaging witness against petitioner, did the trial court's failure to sequester or give appropriate prohibitive instructions to the empanelled jurors regarding their exposure to, or reliance upon, extrajudicial publicity prejudicial to petitioner, deprive petitioner of a fair trial before an impartial tribunal in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

VI.

Did the totality of circumstances described above and other failures of the trial court to protect petitioner against the consequences of prejudicial publicity, deprive petitioner of a fair trial before an impartial tribunal in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

VII.

Did the demonstrable bias of the trial judge against petitioner deprive petitioner of a fair trial before an impartial tribunal in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

VIII.

Where the prosecution benefits from the testimony of the only witness proving one of the elements of a technical violation of the Ohio Securities Act, which testimony was shortly thereafter found to have been perjured, and the prosecution, knowing of the perjured testimony, did nothing to correct the tainted verdict, did the conviction violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the Constitution of the United States. The statutory provisions involved are Ohio Revised Code Sections 1701.01, 1707.02(G), 1707.44 and 2945.59. The foregoing constitutional and statutory provisions are printed in Appendix B, pp. 9a-12a.

STATEMENT OF THE CASE.

Petitioner was convicted by a jury in the Court of Common Pleas of Hamilton County, Ohio, on June 26, 1961,[2] upon a four-count indictment[3] charging violation of the Ohio Securities Act,[4] and was thereafter sentenced to four concurrent terms of not less than one nor more than five years in the Ohio State Penitentiary.[5] The conviction was affirmed without opinion by the Court of Appeals, First Appellate District of Ohio, on May 22, 1962.[6] Petitioner's further appeal to the Supreme Court of Ohio was dismissed by that court on March 20, 1963;[7] and this Court thereafter dismissed petitioner's appeal and denied certiorari, 375 U. S. 935 (January 13, 1964), Mr. Justice Black dissenting, and denied his petition for rehearing, 376 U. S. 935 (February 24, 1964).

On February 28, 1964 petitioner invoked the jurisdiction of the United States District Court for the Southern District of Ohio, Western Division, by filing a petition for writ of habeas corpus pursuant to Title 28, U. S. C. Section 2254, in which he alleged that his conviction resulted from a trial in which he was denied specified constitutional protections.[8] Upon hearing and presentation of evidence, the district court denied the petition on August 6, 1964 and entered its memorandum opinion and order.[9] The judgment of the district court was affirmed on appeal to the Sixth Circuit Court of Appeals on August 19, 1966,[10]

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[2] R. 644a.

[3] R. 626a-628a.

[4] Ohio Revised Code Sections 1701.01-1707.45.

[5] R. 645a.

[6] R. 646a.

[7] R. 646a; *State v. Stickler,* 174 Ohio St. 382, 189 N. E. 2d 433 (1963).

[8] R. 6a-45a.

[9] R. 647a.

[10] Appendix A, p. 8a.

and rehearing was denied on September 21, 1966.[11] It is from the decision and order of affirmance entered by the Court of Appeals that petitioner seeks relief from this Court.

STATEMENT OF FACTS.

The circumstances surrounding petitioner's trial in the state court require a statement of the events which both preceded the trial and occurred during the course of the trial, events which gave rise to massive prejudicial publicity which permeated the community in which petitioner was tried. This material will be presented separately from the evidence produced in court.

Publicity.

On January 11, 1961, petitioner was charged by federal authorities with having committed interstate fraud by wire in obtaining $6,000.00 by the use of a telephone.[12] On the following day, the newspapers publicized the charge with headlines announcing: "Lawyer Charged in 4 Million Dollar Fraud," [13] and quoted F. B. I. agents who accused petitioner of "victimizing" hundreds of perons.[14] Radio and television for months thereafter repeatedly characterized petitioner as being "the mastermind of a fraudulent investment operation," [15] who had defrauded the entire spectrum of the community, from "assembly line workers * * * to * * * household names in the community." [16]

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[11] Appendix A, p. 8a.

[12] R. 105a.

[13] R. 105a-109a; R. 187a.

[14] R. 105a.

[15] R. 146a, 147a, 105a.

[16] R. 149a.

The federal charge, however, was ultimately dismissed by a federal district judge,[17] who was prompted by the pervasive publicity to conduct his own independent investigation of the charges and determined to delay the trial.[18] The continuance of the trial resulted in editorial criticism of the judge who found himself obliged to appear before the federal grand jury to explain his act and give his assurance that the speedy trial urged by the editorial would have resulted in an acquittal. Moreover, he stated that a continuance of the trial on the federal charge would enable the state prosecutor, who had "the big end of this case, which is more than three million dollars" (Appendix C, p. 25a), to proceed with his investigation.

Approximately one week after the federal charge was returned against petitioner, he was forced into involuntary bankruptcy. Pleadings filed in the bankruptcy proceedings, as well as hearings before the referee, provided the news media with an opportunity to re-emphasize their repetitious characterization of petitioner as one who had fraudulently obtained "three million dollars in manipulation of funds," [19] as well as having transferred or concealed funds.[20]

It was in this setting, with the news media attacking petitioner, the press editorializing for prompt action, and the federal charges pending, that petitioner and others, including one John J. Ruf, an accountant, were indicted separately for violating provisions of the Ohio Securities Act.

Immediately prior to and at the commencement of the trial on June 15, 1961, petitioner's repeated motions for

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[17] Appendix C, p. 20a.

[18] R. 114a; R. 116a; R. 192a.

[19] R. 148a; R. 191a; R. 193a.

[20] R. 109a, 110a, 146a, 147a, 148a, 149a.

continuance,[21] and for change of venue [22] were overruled. [23] On the first day of trial twelve prospective jurors were examined on *voir dire*,[24] at which time the court adjourned without admonishing the unsequestered prospective jurors not to read, listen to or view any publication, radio or television concerning the trial.[25] The same day the press reported, "John Ruf Missing; One of Four Named in Stickler Case";[26] the local radio and television stations sensationalized Ruf's disappearance by reporting that his whereabouts became a "critical question * * * as the Leslie Stickler fraud case got under way." [27] The same evening, Ruf's attorney appeared on television at 7:00 P. M. and 11:00 P. M. and delivered the following statement:

> "Well, Mr. Ruf has been extremely upset and depressed ever since Leslie D. Stickler's financial dealings became public. Mr. Ruf lost his life's savings through loans made to Stickler. He felt responsible for the losses of his friends and relatives who also invested with Stickler. He had been unable to find a job, and he had been very nervous. Mr. Ruf was in the office Tuesday morning to discuss his trial which was scheduled for the next Monday. He was here for about two hours, he left at noon and has not been seen or heard from since."
>
> "I only hope that he will be located in time to go to trial on Monday so that his complete innocence of any criminal wrongdoing can be established." [28]

At the convening of the trial the following morning, defense counsel moved to introduce a film of the prejudicial

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[21] R. 305a; R. 307a.
[22] R. 307a.
[23] R. 307a; R. 317a.
[24] R. 206a-249a.
[25] R. 249a-250a.
[26] R. 196a.
[27] R. 163a-167a.
[28] R. 16a-17a; R. 165a; R. 167a.

broadcast, but was denied the opportunity to do so by the trial judge, who dismissed the matter with the remark that he could not "see it"; that such a procedure would permit defendants to "exonerate" themselves "by getting somebody to make derogatory remarks"; and that he had "nothing to do with that." [29] The judge further commented significantly on Ruf's disappearance:

> "The prosecuting attorney may want this man as a witness. It is their misfortune. That helps your client, maybe, rather than hurts him." [30]

Petitioner's request for reinterrogation of the jury was granted by the court with the consent of the prosecutor, but only after severe restrictions had been imposed upon the scope of defense counsel's inquiry.[31] Upon general questioning, three prospective jurors admitted having seen and heard the telecast by Ruf's attorney.[32] One juror, who on the preceding day had stated that he had "no opinion" as to petitioner's guilt[33] was re-examined as follows:

> "Juror: I believe anybody that saw it would have formed an opinion.
>
> Defense Counsel: That opinion would have been prejudicial to Mr. Stickler, right?
>
> Juror: Yes, sir.
>
> Defense Counsel: And you formed an opinion against Mr. Stickler because of that?
>
> Juror: Yes, sir." [34]

This juror was challenged for cause and excused.[35]

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[29] R. 252a.
[30] R. 253a.
[31] R. 253a-254a.
[32] R. 255a.
[33] R. 244a.
[34] R. 256a-257a.
[35] R. 257a.

The second juror who saw the telecast stated, "Maybe it would be best I get off." [36] Petitioner's challenge for cause was summarily overruled,[37] and the juror was excused on peremptory challenge.[38] The third juror who viewed the telecast and was seated, was uncertain as to the effect of the statement and conceded at one point during his examination that "I can't say that it didn't influence me * * *" [39]

Nineteen out of twenty-one of the original panel,[40] and eleven of the twelve jurors ultimately seated[41] admitted exposure to newspaper publicity. The twelfth denied exposure, but admitted she heard other jurors "talking about the case." [42] Four of the twelve sworn jurors admitted that they had been exposed to television publicity concerning the case,[43] one of whom had viewed Ruf's attorney the preceding night.[44] Three of the twelve jurors [45] admitted reading the morning edition of the *Cincinnati Enquirer*

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[36] R. 264a.

[37] R. 264a.

[38] R. 270a.

[39] R. 278a.

[40] Carney, R. 207a, 225a, 226a; Pitrolo, 211a, 229a; Corman, 212a, 232a; Meyers, 213a, 233a; Romanello, 214a, 235a; Calhoun, 215a, 237a; Colegrove, 217a, 240a-241a; Tucker, 218a, 243a; Cash, 219a; Vilas, 246a; McBeth, 221a; May, 258a, 259a; Wolf, 267a, 268a-269a; Orso, 271a, 273a; Horsley, 275a, 278a; Grace, 282a, 283a; Stump, 286a, 287a, 288a; Stanton, 294a, 295a; Hall, 299a.

[41] Carney, R. 207a, 225a, 226a; Pitrolo, 211a, 229a; Corman, 212a, 232a; Horsley, 275a, 278a; Wolf, 267a, 268a-269a; Calhoun, 215a, 237a; Hall, 299a; Grace, 282a, 283a; Stanton, 294a, 295a; May, 258a, 259a; Orso, 271a, 273a.

[42] R. 291a.

[43] R. 229a; R. 259a; R. 278a; and R. 294a.

[44] R. 278a.

[45] R. 269a; R. 282a; and R. 295a.

which had headlined its report: "In Stickler Case, Missing Bookkeeper Feared Dead." [46]

Upon adjournment of the trial on Monday, June 19, 1961, the trial court cursorily cautioned the jury not to talk about the case,[47] but utterly failed to instruct and admonish the jury with regard to the prohibition against listening to radio, viewing television and reading newspaper reports concerning the trial. On June 19, 1961, Ruf's body was found in the Ohio River. That evening radio and television reported, "Rapid and startling developments in the * * * John Ruf disappearance * * * the missing defendant in the Leslie Stickler fraud case * * *;[48] "A case already packed with sensational developments * * *. The body of John Ruf * * * was found floating in the Ohio River * * * it was discovered at the morgue that there were indications a bullet had entered his right temple—posing the question of suicide or foul play." [49] Petitioner was at all times associated with Ruf by the news media and their discussion of the manner in which he died.[50] As the trial convened on Tuesday, June 20, 1961, the press heralded, "Stickler Figure is Dead," [51] and reported, "The Homicide Squad was investigating to determine whether Ruf, missing for a week, had shot himself or was a victim of foul play." [52]

To petitioner's motion to interrogate the jury to discover the effect which the publicity surrounding Ruf's death may have had upon the jury, the court retorted:

---

[46] R. 122a.
[47] R. 418a.
[48] R. 173a-174a.
[49] R. 174a-175a.
[50] R. 173a-180a.
[51] R. 124a.
[52] R. 124a.

> "*That is overruled instantly. That is overruled instantly.* I cannot without some evidence that the jury, some which appears without requestioning, allow that. *I never heard of that.* That is assuming the jury has violated the caution of the Court, and I cannot assume that and give you the privilege of doing that and compel the prosecutor's office to overcome the presumption. Now, that will not be granted." (Emphasis supplied.) [53]

Petitioner renewed the motion for inquiry to the jury. The trial judge answered:

> "No, I can't assume the jury is influenced. Whether they were momentarily, they have been instructed. At the time the case is submitted to them, that is the time. Their mind (sic) fluctuates one side to the other, of course, during the progress of the trial. It wouldn't be human if it didn't. However, at the time the case is submitted to them for deliberation, their minds must be open, and then start, whatever their mind is at the time, start anew to consider the evidence and the instructions of the Court." [54]

Thus, petitioner was foreclosed in his effort to examine the jury as to this critical development which engulfed the trial. Nor did the trial judge, in his charge to the jury, fulfill his promise to instruct the jury "at the time the case is submitted to them" to disregard the publicity which prevailed throughout the trial.[55]

Even when a prosecution witness, from the witness stand, testified that, as a bail bondsman, he refused to handle petitioner's bond because "it wouldn't be worth the gamble, or I would be in the same fix as Mr. Ruf," a defense motion for mistrial was not granted.[55a]

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[53] R. 422a.

[54] R. 422a.

[55] R. 623a-644a.

[55a] R. 451a-452a.

In addition to the pre-trial publicity, and the publicity concerning Ruf's disappearance and death, the news media reported the details of the trial as it progressed, including the rulings on defense motions not presented or argued in the presence of the jury,[56] and reemphasized the sensational aspects of the testimony of prosecution witnesses.[57]

Evidence.

The evidence presented to the jury disclosed that on January 3, 1961, one Robert Steffen agreed to loan petitioner $10,000.00. One-half of this sum was to be given to petitioner in cash, and the other half was in the form of an assumption of a $5,000.00 obligation which was then due from Edgar Shott, a lawyer, to Steffen.[58] This assumption was possible because petitioner was indebted to Shott for the same $5,000.00 which Shott owed to Steffen.[59] In return for the credit and cash which Steffen extended to him, petitioner gave Steffen two promissory notes which were written on ordinary printed note forms,[60] each in the face amount of $6,000.00, and due in 30 days and 60 days, respectively,[61] and which yielded Steffen interest at the rate of 240 per cent per annum, and 120 per cent per annum.

Steffen testified that petitioner had told him that he was loaning the money to contractors who were in need of funds. However, Steffen made it clear that he was looking

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[56] R. 120a; R. 122a; R. 126a; R. 182a; R. 184a; R. 185a; R. 198a.

[57] R. 125a; R. 126a; R. 129a-130a; R. 183a; R. 199a.

[58] R. 346a-349a.

[59] R. 347a.

[60] Appendix C, pp. 13a-14a.

[61] R. 366a-367a.

only to petitioner for repayment of the loan;[62] that he was not relying upon what petitioner was doing with the money;[63] and that he had not commenced dealing with petitioner because of any advertisement or promotion. The four count indictment returned against petitioner charged that in giving these notes to Steffen, petitioner had violated the Ohio Securities Act in that he had, as to each note, sold an unregistered security without a dealer's license.

Upon the authority of Ohio's "similar acts" statute,[64] the state offered evidence of other transactions in which petitioner had engaged with other individuals in the exchange of ordinary promissory notes for money. This evidence was presented over objection of counsel and permitted by the court to establish motive or intent of other acts of a similar nature to those charged in the indictment. Seven witnesses testified that petitioner had borrowed money from them in various amounts, and at usurious rates of interest. Six of the seven admitted that they had come to petitioner through personal contact with him in one form or another.[65] The seventh, Patrick Sestito, testified that he "heard through the grapevine" that petitioner was in the investment business and thus gave him money and received a note from him on December 1, 1960 and December 15, 1960; he had never met petitioner he said, before November, the previous month,[66] and that he had "definitely" not heard of petitioner through Edgar Shott.[67] Through Sestito, the prosecution had attempted to establish a critical element of the offense charged, that

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[62] R. 380a.

[63] R. 370a.

[64] Section 2945.59, Ohio Revised Code.

[65] R. 392a; R. 427a; R. 441a; R. 448a; R. 482a; R. 496a.

[66] R. 457a.

[67] R. 465a.

is the element of sale offered to the public.[68] However, Sestito was called a few days later as a witness in the criminal trial of Edgar I. Shott, who had been charged with commission of the same offense for which petitioner was tried, and in that case he testified that he heard about petitioner through Shott and loaned money to petitioner through Shott.[69]

During his opening statement to the jury, the prosecutor stated that the state would prove that petitioner's financial troubles had begun when a collection agency in which he was a partner fell into debt, and he began to borrow money to pay off his share of debts.[70] Defense counsel, in answer to the prosecution's opening statement, admitted petitioner had begun to borrow money, but that his honor compelled him to pay the debt rather than seek refuge in bankruptcy.[71]

Petitioner took the stand in his own defense; on direct examination, he was interrogated as to the technical charge of security violation only.[72] On cross-examination, the prosecutor asked questions designed to demonstrate that petitioner had incurred this business debt because he had embezzled funds from clients.[73] Over the violent objection of defense counsel, the trial court permitted this unfair and unsubstantiated innuendo on the ground that the matter had been touched upon by both sides in their openings.[74]

In his final argument to the jury, the prosecutor highlighted his unproved claim of embezzlement and fraud in asserting that petitioner had been deceitful with his

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[68] Section 1707.44(A) and (C), Ohio Revised Code.

[69] R. 204a.

[70] R. 320a.

[71] R. 328a-329a.

[72] R. 540a-544a.

[73] R. 566a-576a.

[74] R. 567a; R. 575a.

money-lending friends through the use of the following language:

> He [petitioner] gave them the story because he knew very well that if he went to them and said, "Mr. Steffen, you don't know me, I don't know you, but the fact of the matter is a few years ago I had a collection agency and I embezzled money and I need some cash. Are you willing to give it to me?" What is a man going to say if he has any common sense at all? "Why, do you think I am crazy? You took somebody's money once, you are not going to take mine."
>
> Mr. Smith: I object to that argument on embezzlement.
>
> The Court: Objection overruled.[75]

The record is filled with other instances demonstrating the bias of the judge against the petitioner, bias which had a definite prejudicial effect upon the trial. These facts will be set forth in detail in Argument II, *infra*.[76] In general, judicial partiality was manifested in express admissions of the trial judge;[77] in prejudicial rulings related to controlling the effect of publicity, both during the *voir dire*,[78] and upon subsequent requests for reinterrogation of jurors.[79] Bias was reflected in watered-down admonitions to the jury relating to publicity;[80] in gross discrimination against the defense in controlling and conducting the examination of witnesses;[81] and in charges to the jury which virtually directed a verdict against the petitioner on charges for which he had not been indicted;[82] as well as in almost every other stage of the proceedings.

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[75] R. 619a.

[76] pp. 43 through 57, *infra*.

[77] R. 253a; R. 390a.

[78] R. 252a, 254a-57a; 262-64a, 274a-79a, 301a-03a.

[79] R. 422a.

[80] R. 264a-65a, 452a-53a.

[81] See pp. 50-51, *infra*.

[82] See pp. 55-56, *infra*.

REASONS FOR GRANTING THE WRIT.

I.

MISCONDUCT OF THE TRIAL COURT IN FAILING TO PROTECT PETITIONER AGAINST TRIAL AND PRE-TRIAL PUBLICITY DENIED PETITIONER AN IMPARTIAL TRIBUNAL AND A FAIR TRIAL.

This Court has scrupulously guarded the right of the independent press to publish out-of-court news and editorial comment about pending judicial proceedings, virtually without governmental restraint.[83] But, as the quantum and the techniques of the communications media have expanded to meet the public demand for contemporaneous details of notorious criminal trials, the Court has become increasingly concerned with the consequences to fair trial of such untrammelled use of freedom of expression, both in federal[84] and state [85] criminal prosecutions.

In the line of cases culminating with *Sheppard v. Maxwell*[86] last term, the Court; on a case-by-case basis, has engaged itself in the considerable task of weighing the delicate due process considerations involved, and articulating the rules to be applied, when a notorious criminal trial takes place in a community inflamed by

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[83] *Bridges v. California*, 314 U. S. 252, 265 (1941), established that press freedom was entitled to "the broadest scope that could be countenanced in an orderly society," subject only to the restraints of the clear and present danger standard, defined as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." See also *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Wood v. Georgia*, 370 U. S. 375 (1962).

[84] *Marshall v. United States*, 360 U. S. 310 (1959); *Janko v. United States*, 366 U. S. 716 (1961).

[85] *Irvin v. Dowd*, 366 U. S. 717 (1961); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Estes v. Texas*, 381 U. S. 532 (1965); *Sheppard v. Maxwell*, 384 U. S. 333 (1966).

[86] 384 U. S. 333 (1966).

massive prejudicial publicity. These decisions reflect a careful attempt to assure that "the conclusions to be rendered in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"[87] while "refusing to sacrifice freedom of press to the whims of judges."[88]

Sheppard v. Maxwell pinpoints this dual concern. Pointing out the importance to society of preserving independent press comment on criminal trials,[89] the Court noted its unwillingness "to place any direct limitations on the freedom traditionally exercised by the news media."[90] But it cautioned that freedom of the press "must not be allowed to divert the trial from the 'very purpose of a court system * * * to adjudicate controversies * * * in the calmness and solemnity of the courtroom according to legal procedures.' "[91] The Court pointedly avoided the consideration of "what sanctions might be available against a recalcitrant press" in order to "reduce the appearance of prejudicial material and to protect the jury from outside influence,"[92] by emphasizing the trial court's responsibility to use its power to insulate the defendant against the consequences of the exercise of press freedom, and concluded

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[87] *Patterson v. Colorado,* 205 U. S. 454, 462 (1907).

[88] Douglas, J., *The Public Trial and the Free Press,* 33 Rocky Mt. L. Rev. 1 (1960).

[89] "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." 384 U. S. 333, 350 (1966).

[90] Ibid.

[91] Id. at 350-351, citing *Cox v. Louisiana,* 379 U. S. 559, 583 (1965) (Black, J., dissenting).

[92] Id. at 358.

that the trial court had available to it certain procedures[93] other than news media suppression which could have preserved a fair trial for the defendant, but which it failed to employ.

This approach, which seeks to give the accused maximum protection against outside influence at his trial "without corresponding curtailment of the news media,"[94] has been very largely misunderstood by subsequent courts which have been called upon to apply the principles of *Sheppard*—to the detriment of precious First Amendment rights.[95]

The case at bar provides abundant opportunity—an opportunity which, petitioner submits, is sorely needed—for this Court to clarify the sophisticated and delicate balance of interests which has characterized its efforts to resolve the pressing problems of potential conflict between the guarantees of free press and fair trial. The record here amply demonstrates the trial court's total abandonment of its responsibility to protect the accused against extrinsic pressures and news media influences as in *Sheppard*,[96]

[93] E.g., the imposition of stricter rules governing the use of the courtroom by newsmen, insulations of the witnesses from interview by the news media, control of the release of information to the news media by police officers, witnesses and counsel for the prosecution and defense, continuance, change of venue and mistrial when the other measures fail to prevent prejudicial publicity from contaminating the courtroom atmosphere. *Id.* at 358-359, 363.

[94] 384 U. S. 333, 362 (1966).

[95] E.g., *Phoenix Newspaper, Inc. v. Superior Court of Arizona*, 418 P. 2d 594 (Ariz. 1966) (trial court attempted to impose prior restraint against news reporting of events in courtroom). And see *In re Shaw*, No. 16942, Superior Court, Springfield, Mass. (Nov. 4, 1966) (unreported) (trial court found newspaper reporter in contempt for violating court order to refrain from publishing pretrial overruling of defense motion to suppress evidence). See Appendix C, pp. 26a-31a.

[96] 384 U. S. 333, 357-58 (1966).

under the mistaken impression that judicial paralysis was required by the First Amendment.[97]

The trial in the instant case took place against a background of inflammatory and prejudicial pre-trial publicity. Petitioner was charged with technical non-compliance with registration requirements of the Ohio Securities Law arising out of the transfer of two promissory notes in modest amounts to a single creditor, but the entire trial community was informed by pervasive news media coverage that the F. B. I. had uncovered a multi-million dollar fraudulent investment swindle masterminded by petitioner in which hundreds of prominent citizens of the community had been victimized, many of their entire life savings.[98]

During the empanelling of the jury, the trial community was further inundated with publicity describing

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[97] E.g., R. 265a, R. 312a, R. 421a.

A few quotations from the judge's remarks during the trial amply demonstrate his attitude of utter helplessness in the face of extrinsic publicity:

> "* * * the Court cannot, except in very unusual circumstances, control the news, either in newspapers or in television broadcasts or radio broadcasts. * * *, this Court has no control over the newspapers and neither has this Court any control over what you watch or read, except—and particularly on radio—you hardly know what is coming on until you hear it * * * it is utterly impossible for this Court to control your thoughts of what you see when you are away from the courthouse * * *." R. 265a.

> "* * * I have never had a panel so far who was totally indifferent to any publicity that they might have seen * * *. This Court can't control what goes on. I didn't see it. I don't know anything about it. I haven't a television, so I wouldn't be aware of it." R. 312a.

> "We can't stop broadcasting, even the newspapers and other media of communication. That is part of our freedom of speech * * *. I think these media of communication know what the law is and just what their limits are, and this Court surely doesn't want them, in any way, to interfere with our freedom of speech, which is one of our best protections in this world." R. 421a.

[98] R. 105a-231a, 139a-51a, 187a-97a.

the mysterious disappearance of Ruf, an accountant, who was under separate indictment for his role in the broad financial scheme, and who was expected to be a damaging witness against petitioner.[99] Speculation as to his whereabouts continued in the news media as petitioner's trial progressed until several days later, when Ruf's lifeless body was found in the Ohio River, a bullet in his head. The publicity surrounding this event combined sensational reporting with speculation as to how he died and who was responsible for his death. Petitioner, the immediate apparent beneficiary of Ruf's permanent silence, was closely connected with such speculation.[100] Thus, although petitioner was being tried solely upon technical charges of security law violation, the massive publicity, both before and during trial,[101] portrayed him as a mastermind financial manipulator who had bilked hundreds of local persons in the trial community of millions of dollars, and whose ruthless conduct had been responsible, either directly or indirectly, for the mysterious disappearance and subsequent death of a key witness against him.[101a]

Under such circumstances, the trial court's abdication of its responsibility to protect the impartiality of the tri-

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[99] R. 122a, 163a-72a, 197a.

[100] R. 124a, 172a-86a, 199a.

[101] Because the jury was not sequestered in the instant case, but had the opportunity to view and hear the publicity disseminated during trial, both pretrial and trial publicity will be considered together.

[101a] There can be little doubt that the jury was exposed to speculation that petitioner was responsible for Ruf's mysterious disappearance and subsequent death. See testimony of bondsman Winters who explained to the jury on redirect examination that he refused to handle petitioner's bond because "it wouldn't be worth the gamble, or I would be in the same fix as Mr. Ruf." R. 451a. Immediate defense motion for mistrial thereafter was brushed aside by the court. R. 452a.

bunal [102] in which petitioner was tried is manifest. Its failures, for purposes of analysis, may be separated into several categories:

A. Failure to grant defense motions for continuance, change of venue and mistrial as a consequence of prejudicial trial and pretrial publicity.

B. Failure to permit detailed interrogation of the jury to elicit bias resulting from prejudicial trial and pretrial publicity.

C. Failure to sequester or to give appropriate prohibitive instructions to the jury to limit the prejudicial effect of trial publicity.

Each of these categories will be examined separately below.

A.

The trial court's failure to grant defense motions for continuance, change of venue and/or mistrial denied petitioner his Sixth and Fourteenth Amendment rights to an impartial tribunal and due process of law.

It is not here contended that all publicity about a criminal case is necessarily so prejudicial that a conviction thereafter obtained cannot stand constitutional inspection. But it is urged that, under standards laid down by this Court, the out-of-court publicity in this case was inherently prejudicial, or at least raised a presumption of prejudice to petitioner which the record fails to rebut, and

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[102] Petitioner's claim that his tribunal was biased includes both the usual contention in cases of massive and prejudicial trial publicity that the *jury* was contaminated and the more frequently omitted, but just as damaging charge that the judge's impartiality was adversely affected as well. Evidence of the bias of the judge in ruling upon trial matters is presented in argument II, *infra*, pp. 43-57.

that the trial court's failure to delay or move the trial to a less contaminated atmosphere, or to grant a mistrial when it became clear that the damage had been done, was of constitutional dimension.

In *Marshall v. United States*,[103] a federal supervisory decision raised to constitutional status by its recent application to state criminal proceedings,[104] the Court held that "where the jurors were exposed 'through news accounts' containing information that was not admitted at trial" such publicity was prejudicial and that "the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures'."[105] Mr. Justice Jackson, concurring in *Shepherd v. Florida*,[106] has pointed out the underlying reasoning behind such a determination:

> "When such events take place in the courtroom, defendant's counsel can meet them with evidence, arguments, and requests for instructions and can at least preserve his objections on the record.
>
> "But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable [evidence is] put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented * * *." (Bracketed material supplied.)

Moreover, it has been suggested that publicity derived from information supplied by prosecuting and defense attorneys, court attaches and law enforcement officers involve a particularly odious form of jury contamination.

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[103] 360 U. S. 310 (1959).

[104] See *Sheppard v. Maxwell*, 384 U. S. 333, 351 (1966).

[105] Id. at 351.

[106] 341 U. S. 50, 52 (1951).

That statements of elected officials and public servants involved in the war against crime carry great weight in the community, and that such conduct on the part of law enforcement authorities is prevalent in most highly publicized trials, either to obtain a climate of community opinion in which conviction is likely or to accommodate the press because of weakness or the hope of political favor, cannot seriously be doubted.[107]

Furthermore, accusatory publicity charging the accused with guilt of the crime in question or others, or attacking his character, even if accurate, may create "opinions of guilt long before the trial, far removed from any safeguards against inadmissible matter." [108]

All of these elements demonstrating presumptive prejudice—accusatory publicity, publicity emanating from law enforcement authorities and officers of the court, publicity of information inadmissible or not admitted into evidence—are present in repetitive abundance in the case at bar.

Consider the damaging information disseminated to the trial community by the news media which never ap-

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[107] E.g., *Stroble v. California*, 343 U. S. 181 (1952) (prosecutor released confession to press even before defendant had completed his statement); *Shepherd v. Florida*, 341 U. S. 50 (1951) (newspapers published confession of defendant and attributed information to sheriff; confession was never offered at trial); *Irvin v. Dowd*, 366 U. S. 717 (1961) (prosecutor and police officials issued intensively publicized press releases stating that accused had confessed to six murders); *Rideau v. Louisiana*, 373 U. S. 723 (1963) (accused interviewed in jail by sheriff for television); *Sheppard v. Maxwell*, 384 U. S. 333 (1966) (police officers and coroner released information relating to refusal of accused to take lie detector test, and clues found by police but never introduced in evidence). And see the official account of opinion-molding and toadying to news media pressure by Dallas law enforcement authorities in the *Report of The President's Commission on the Assassination of President John F. Kennedy* (1964), pp. 231-242.

[108] *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364, 373 (2d Cir. 1963).

peared in evidence in petitioner's trial—information to which the unsequestered jury was exposed without any of the traditional procedural safeguards available when such evidence is offered in the courtroom.[109]

The publicity charged petitioner repeatedly with having been indicted for and having committed crimes other than those for which he was required to stand trial in the instant case—evidence admissible, if at all, only for the limited purposes of the "similar crimes" statute of Ohio[110] under stringent instructions to the jury limiting its use. Quite apart from the technical charges for which he was being tried, petitioner was charged by the news media with masterminding a financial swindle of grandiose proportions involving multimillions of dollars and hundreds of victims,[111] concealment of assets in an involuntary bankruptcy,[112] fifteen separate indictments for securities viola-

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[109] Such procedural controls include confrontation, cross-examination, admission of evidence under appropriate judicial instructions to the jury, rebuttal by other evidence, preservation of record for appeal, etc.

[110] Ohio Rev. Code Section 2945.59. Although this statute permits proof of other crimes under certain circumstances, and such evidence is "generally recognized to have potentiality for prejudice," *Spencer v. Texas*, _____ U. S. _____, 35 U. S. L. Week 4164, 4166 (Jan. 23, 1967), petitioner does not here urge the unconstitutionality of the Ohio statute. Rather he contends that the extrajudicial exposure of the community by the news media to evidence of other crimes allegedly chargeable to petitioner *without any judiciary control of the use of such information*, permits conviction for a *specific* crime by "the use of prior convictions to show nothing more than a *disposition to commit crime* [which] would violate the Due Process Clause of the Fourteenth Amendment." (Emphasis and bracketed material supplied.) *Spencer v. Texas*, id. at 4169. And see *Marshall v. United States*, 360 U. S. 310 (1959); *Michelson v. United States*, 335 U. S. 469 (1948); *Boyd v. United States*, 142 U. S. 450 (1892).

[111] R. 108a, 109a, 110a, 112a, 114a, 115a, 117a, 118a, 124a, 127a, 129a, 140a, 141a, 143a, 144a, 145a, 146a, 147a, 148a, 150a, 169a, 171a, 187a, 188a, 191a.

[112] R. 109a, 110a, 146a, 147a, 148a, 149a.

tions and larceny by trick,[113] use of telephone lines for fraudulent purposes,[114] embezzlement of funds from a client,[115] and suspicion of murder of a key prosecution witness.[116]

Particularly damaging was the news media reporting of unsworn statements of witnesses who never appeared to testify at petitioner's trial. Adverse comments by the assistant district attorney,[117] the head of the Ohio Division of Securities,[118] an attorney-examiner for that agency,[119] the county prosecutor,[120] an attorney representing some of the petitioner's creditors,[121] a potential prosecution witness,[122] court attaches,[123] and other "authorities,"[124] appeared frequently and prominently in the pervasive publicity which enveloped petitioner, but the trial transcript is barren of any repetition of such testimony by such persons under oath and subject to cross examination.

And Ruf's public attempts to exonerate himself at petitioner's expense, in the worst form of hearsay, were reported after his disappearance[125] and even after his death,[126] after the most remote possibility that he might

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[113] R. 119a, 120a, 121a, 123a, 125a, 151a, 194a, 195a.

[114] R. 105a, 139a, 140a, 141a, 143a, 145a, 147a, 148a, 188a, 189a, 192a.

[115] R. 128a, 153a.

[116] R. 124a, 127a, 173a, 181a, 182a.

[117] R.105a, 108a, 144a, 145a, 187a, 188a, 189a.

[118] R. 105a, 106a, 148a.

[119] R. 189a.

[120] R. 111a, 112a, 119a, 194a.

[121] R. 105a, 170a.

[122] R. 122a, 124a, 163a, 167a, 189a.

[123] R. 121a.

[124] R. 147a, 148a.

[125] R. 122a, 124a, 163a, 167a.

[126] R. 174a-175a.

appear at trial and subject himself to oath and cross-examination had been effectively foreclosed.

How appropriate is the wry comment of Mr. Justice Frankfurter, concurring in *Pennekamp v. Florida*: [127]

> "Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences."

The public comments of the lawyers, public officials and law enforcement officers who were the cooperative sources, if not the procuring cause, of frequent and pervasive publicity hostile to petitioner, have already been noted.[128]

It should be observed that much of the pretrial and trial publicity was accusatory in nature; it charged that petitioner was guilty of many crimes and attacked his character with vicious journalistic skill. Apart from the many offenses charged to petitioner, previously noted,[129] petitioner was pictured as a financial mastermind,[130] a persuasive lawyer,[131] a classic spender[132] who practiced his nefarious financial wizardry in an elegant and sumptuous suite of offices, replete with custom-made furnishings,[133] while bilking hundreds of local citizens of their life savings and concealing these assets,[134] ruthlessly driving at least one of his victims to suicide.[135]

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[127] 328 U. S. 331, 362 (1946).

[128] See record references cited in footnotes 117-124, *supra*.

[129] See record references cited in footnotes 111-116, *supra*.

[130] R. 141a, 144a, 146a, 147a, 150a.

[131] R. 187a, 197a.

[132] R. 149a, 194a.

[133] R. 187a, 197a.

[134] R. 146a, 147a, 148a, 149a.

[135] R. 177a, 183a, 185a, 186a, 451a.

Moreover, the material inaccuracies in the massive publicity emphasize its prejudicial qualities. The news media tied petitioner to Ruf in an embrace which not only did violence to the facts, but was fatal to petitioner's chance for a fair trial, in view of the report of Ruf's disappearance and death during the trial. It was erroneously suggested that Ruf was petitioner's bookkeeper,[136] that he was a co-defendant in petitioner's case[137] and that, but for his untimely demise, he would have been a damaging prosecution witness against petitioner.[138] Further, incriminating admissions of fraud, allegedly made by petitioner but emphatically denied by him, were reported by the news media in fiendish detail.[139]

Finally, it is a matter of record that the news media repeatedly reported the occurrences in the courtroom *outside the presence of the jury.* Despite the great care taken by all courts to see that their juries are insulated from legal arguments of counsel and court rulings, which are beyond the scope of jury concern, and despite the fact that the jury in the case at bar was excluded from all such

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[136] R. 117a.

[137] R. 165a, 173a, 182a.

[138] R. 122a, 124a, 163a, 167a, 174a-175a.

It is ironic to note that the trial judge himself was responsible for the unwarranted publicity suggesting that Ruf would have been a damaging prosecution witness in petitioner's case. The prosecution, for all the judge knew, might have failed to call him for strategic reasons, or because of his own involvement in the charges, Ruf may have been uncooperative to the prosecution, chosen to exercise his privilege to remain silent, etc. The judge's baseless and prejudicial remark to defense counsel in open court as to Ruf's disappearance, picked up by the news media thereafter, did incalculable harm: "The prosecuting attorney may want this man as a witness. It is their misfortune. That helps your client, maybe, rather than hurts him." R. 253a. Note how thereafter Ruf was referred to as a "Stickler witness" in the news media. R. 185a, 199a.

[139] R. 126a, 129a, 130a, 152a, 153a, 154a, 155a, 156a, 159a, 167a, 182a, 183a, 199a.

proceedings, all of these non-jury episodes were chronicled in the news media in a pattern of prejudice which was devastating to petitioner. The petitioner's withdrawal of his plea of not guilty in advance of trial was duly reported, without any explanation that it was done solely for the purpose of filing a plea in abatement, and not as an admission of guilt.[140] The court's denial of defense motions to quash the indictment and to dismiss the charges—questions going to the heart of the issue of guilt—were reported in the news media for all the jurors to see.[141] The court's denial of a defense motion for trial delay for medical reasons, together with sharply critical remarks of the court and prosecuting attorney suggesting that petitioner was feigning illness, were reported in agonizing detail.[142] And the unsuccessful attempt by the defense to interrogate the jury brought forth a news media report that the court had denied the defense request because of its faith in the jurors' performance of their duty.[143] The devastating implication that the defense thought the jury to be contaminated and unmindful of their oaths was clear.

In a system of law which "has always endeavored to prevent even the probability of unfairness," [144] and which forbids "[e]very procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict * * * or which might lead him not to hold the balance nice, clear and true between the State and the accused," [145] it is inconceivable that the trial

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[140] R. 120a.

[141] R. 157a, 166a, 196a.

[142] R. 178a, 180a, 182a, 184a, 185a.

[143] R. 198a, 422a.

[144] *In re Murchison*, 349 U. S. 133, 136 (1955).

[145] *Tumey v. Ohio*, 273 U. S. 510, 532 (1927), quoted with approval in *Estes v. Texas*, 381 U. S. 532, 543 (1965).

court could have viewed the publicity in this case with equanimity, if he considered it at all[146] in the frame of reference of protecting petitioner's right to a fair trial and an impartial tribunal.

Nor could it be denied that potential jurors were exposed to this inherently or presumptively prejudicial material. Nineteen of the twenty-one potential jurors on the panel, and eleven of the twelve jurors ultimately selected, admitted exposure to publicity about the case.[147] These admissions coupled with the limitations the trial court imposed upon defense counsel in interrogating the jurors[148] and the extensive publicity coverage of the total trial community[149] raise a clear inference that at least "some of [the damaging] material reached members of the jury."[150] And it is too late in the day to suggest that the jurors' *voir dire* protestations of immunity from the inflammatory publicity to which they had been exposed could eradicate the presumption of prejudice to which petitioner was entitled.[151] For "one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes that he may confidently exclude even the unconscious in-

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[146] A clue to the trial court's thinking may be gleaned from his response to defense counsel's motion to offer proof of extra-judicial publicity to support his motion for change of venue: "I am overruling it. *It has no bearing on the case at all.*" R. 302a. It may be that it is asking too much of a poison victim in anguish to identify and analyze the source of his own undoing. See argument on judicial bias, *infra*, pp. 43-57.

[147] See record references cited in footnote 40.

[148] See argument I (B), *infra*, pp. 33-39.

[149] R. 133a-137a.

[150] *Sheppard v. Maxwell*, 384 U. S. 333 (1966), citing *Commonwealth v. Crehan*, 345 Mass. 609, 188 N. E. 2d 923 (1963).

[151] *Irvin v. Dowd*, 366 U. S. 717, 728 (1961): "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

fluence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity." [152]

Under such circumstances, grant of the continuance[153] or change of venue[154] sought by the defense in order to dispel the prejudicial effects of the publicity, was constitutionally compelled.

B.

The trial court's failure to permit detailed interrogation of the jury to elicit bias resulting from prejudicial publicity denied petitioner his Sixth and Fourteenth Amendment rights to an impartial tribunal and due process of law.

Having failed to perform his constitutional duty to delay or move the trial to a less contaminated atmosphere, or grant a mistrial in the face of the massive and intensely prejudicial trial and pretrial publicity, the trial court compounded its unconstitutional performance by failing utterly to shield petitioner from the consequences of the extrajudicial publicity and the bizarre sequence of extraneous events which fatally infected petitioner's trial.

The record amply demonstrates that the trial court, at the prodding of the prosecution, repeatedly frustrated defense counsel's attempts to elicit from the jurors their detailed reactions to the massive pretrial publicity,[155] the publicity involving Ruf's mysterious disappearance, which broke in the headlines while the jury was being em-

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[152] *Delaney v. United States,* 199 F. 2d 107, 112-113 (1st Cir. 1952).

[153] *Ibid.*

[154] Grant of change of venue was constitutionally required in *Rideau v. Louisiana,* 373 U. S. 723 (1963) and *Irvin v. Dowd,* 366 U. S. 717 (1961).

[155] R. 225a, 253a, 254a.

panelled,[156] and the news of Ruf's violent death which occurred during the course of the trial.[157]

In the context of the highly noxious publicity in which petitioner's trial took place, it was of the utmost importance for the court to allow the defense the greatest latitude in probing the reactions of the exposed jurors to the publicity which had inundated the community, in order to discover (by means which were imperfect, to be sure) any effect, subtle or gross, such exposure may have had upon the triers of fact. The performance of this most delicate and sophisticated task was sabotaged again and again by prosecution-suggested, court-imposed evisceration of defense counsel's interrogation of the jurors. During the empanelling of the jury, despite valiant attempts to probe more deeply into the jurors' reactions to the inflammatory publicity, defense counsel was not permitted to interrogate in any greater detail than to inquire whether the jurors were exposed to the publicity, and if so, whether their sworn impartiality was adversely affected by such exposure. Such limitation of jury interrogation to the ultimate fact in issue rendered the interrogation useless as an implement of discovery; it served only to allow the jurors' self-serving declarations of impartiality to obscure the manifest prejudice demonstrated by the record.

And when the highly prejudicial fact of Ruf's mysterious death was reported, the court denied the defense even this scant and pitiful form of jury interrogation; the extent to which any of the jurors were exposed to this publicity was consequently not available to the trial court in determining whether the jury was contaminated by the

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[156] R. 255a, 256a, 262a, 263a, 277a.

[157] R. 421a-422a.

extrajudicial publicity, nor has any appellate court which has reviewed this case on direct appeal or collateral attack had the benefit of such pertinent information.

The court below noted, in affirming the district court's denial of *habeas corpus*, that "[t]he challenger has the burden of persuasion whether the jurors are impartial in the constitutional sense * * * [a] burden * * * which must be carried 'not as a matter of speculation but as a demonstrable reality.'" [158] How could the petitioner possibly have fulfilled this responsibility when the sole means of doing so—interrogation of the jurors in depth—was so severely restricted?

Petitioner contends that the trial court had an absolute duty—a constitutionally imposed duty—to investigate the effects of jury exposure to the extrajudicial events and publicity which permeated the trial atmosphere in the case at bar. Petitioner contends that this duty to investigate includes, at very least, the detailed interrogation of the jury whenever prejudicial material is brought to the attention of the trial court, either *sua sponte*, or upon request of counsel for the defense. And petitioner further contends that, whether or not the trial and pretrial publicity in this case was, in the opinion of this Court, sufficiently massive, pervasive and prejudicial on its face to be considered *inherently prejudicial*, a presumption of prejudice to the defendant arose as a result of the totality of circumstances in this case—a presumption which, unless rebutted by contrary proof, *including the results of detailed jury interrogation*, must stand and thereby invalidate the tainted conviction so obtained.

In short, petitioner urges the adoption of the federal rule of jury interrogation as a trial requirement of consti-

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[158] Court of Appeals opinion, p. 4a, reprinted at Appendix A.

tutional dimension. There is substantial federal authority for the proposition that where a jury has been or might have been exposed to prejudicial out-of-court information, the trial court must investigate the effects of such exposure, and that a presumption of prejudice to the defendant arises, rebuttable, to be sure, until the contrary has been demonstrated.[159] In order to diminish the possibility that general interrogation of the jurors in the presence of each other would inhibit their frank response or allow comments as to specific prejudicial matter to infect other jurors, many courts require individual interrogation of each juror out of the presence of the others, as a protection against publicity-contaminated trials.[160]

The reasoning behind the federal rule demonstrates clearly that it is based not only upon federal criminal procedure, but upon constitutional considerations of fair trial as well.

Consider the language in *Coppedge vs. United States*:[161]

> "* * * *it is essential to a fair trial of a defendant* that the jurors should not know the contents of, lest they take account of, newpaper stories. In order to protect, so far as possible, *this essential right of a defendant*, we have required that trial courts call the attention of jurors specifically to the possibility of such newspaper accounts and to admonish jurors not to read

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[159] *Marshall v. United States*, 360 U. S. 310 (1959); *Coppedge v. United States*, 272 F. 2d 504 (D. C. Cir. 1959); *United States v. Accardo*, 298 F. 2d 133 (7th Cir. 1962); *Krogmann v. United States*, 225 F. 2d 220 (6th Cir. 1953); *Schoeneman v. United States*, 317 F. 2d 173 (D. C. Cir. 1963); *Marson v. United States*, 203 F. 2d 904 (6th Cir. 1953); *Young v. United States*, 346 F. 2d 793 (D. C. Cir. 1965); *Carter v. United States*, 252 F. 2d 608 (D. C. Cir. 1958).

[160] *Coppedge v. United States*, 272 F. 2d 504 (D. C. Cir. 1959); *United States v. Accardo*, 298 F. 2d 133 (7th Cir. 1962).

[161] 272 F. 2d 504, 507 (D. C. Cir. 1959).

them. * * * What is said here applies with equal force to radio news broadcasts or telecasts.

"The inquiry made of the jurors by the court concerning their reading of the newspaper articles was not adequate for the protection of the defendant. The court knew which of the regular jurors had read the newspaper articles. *No individual inquiry was addressed to these persons as to the possible* influence of the articles upon each of them. Only a general and very brief inquiry was made of the jury as a whole. There was even then no admonition that jurors who had read the articles must not reveal their purport to the remaining jurors. *It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial.* Not only so, but had one or more of them said they would be so influenced, and especially if they had then explained why, the damage to defendant would have been spread to the listening other jurors. In view of the nature of the articles the court should have made a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles." (Emphasis supplied.)

And see *Krogmann v. United States:* [162]

"Generally, an incorrect, unfavorable report of the evidence presented against a defendant on a material issue, which comes to the attention of a juror or jurors during the pendency of the trial raises a rebuttable presumption that *the rights of the defendant have been prejudiced.* The District Judge should ascertain if the report has come to the attention of a juror and if so, take the necessary steps to rebut such presumption, and if not convinced that the presump-

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[162] 225 F. 2d 220, 228 (6th Cir. 1955).

tion has been rebutted, declare a mistrial." (Emphasis supplied.)

If any doubt remains as to the constitutional status of the federal rule requiring jury interrogation in depth upon a showing that prejudicial material has been published, then the application of *Marshall v. United States,*[163] the federal supervisory decision of this Court upon which this entire line of federal authority is based, to state criminal proceedings as a constitutional imperative in *Sheppard v. Maxwell,*[164] is clinching proof.

Nor has the federal interrogation rule been ignored by state courts.[165] In *People v. Cox,*[166] a case whose surrounding publicity did not approach "the carnival disabilities of [*Estes v. Texas*] or [*Sheppard v. Maxwell*]"[167] the court insisted that the trial court's responsibility to protect the accused from out-of-court publicity included detailed interrogation of the jury to ascertain the extent of prejudice produced by the offending material. The court noted:

> "It is true that inquiry of a jury during the process of a trial is apt to be unsatisfactory but it at least gives some suggestion as to whether the verdict was tainted with improper consideration and improper influences * * *. It is clear that the determination to be made by the trial court * * * calls for the exercise of a sound judicial discretion, the abuse of which will constitute reversible error * * *. It strikes us that *inquiry of the jury is at least a condition essential to the exercise of a sound discretion and that due process*

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[163] 360 U. S. 310 (1959).

[164] 384 U. S. 333, 351 (1966).

[165] *People v. Cox,* 220 N. E. 2d 7 (Ill. App. 1966); *Commonwealth v. Crehan,* 345 Mass. 609, 188 N. E. 2d 923 (1963); *State v. Adams,* 141 Ohio St. 423, 48 N. E. 2d 861 (1943).

[166] 220 N. E. 2d 7 (Ill. App. 1966).

[167] Id. at 9.

ought not to hang in the balance on the conjecture that no harm was done. At least human agencies will have done all that is humanly possible to ascertain the truth of the matter * * *." (Emphasis supplied.)[168]

In the case at bar, against a background of pervasive prejudicial publicity, defense counsel's attempts to interrogate the jurors in detail were so severely limited by the trial court in two instances as to frustrate entirely the legitimate functions of such inquiry; in a third episode during the trial, after highly inflammatory material had inundated the trial community, the court blocked defense efforts to interrogate the jury entirely. The record here is ripe for a declaration by this court that the federal standard requiring jury interrogation is of constitutional dimension, and therefore applicable to state criminal proceedings.

C.

The trial court's failure to sequester or to give appropriate prohibitive instructions to the jury to limit the prejudicial effect of out-of-court publicity denied petitioner his Sixth and Fourteenth Amendment rights to an impartial tribunal and due process of law.

The paralysis of the trial judge was manifested in yet another manner to deprive the petitioner of the protections against the consequences of adverse publicity to which he was entitled. In the face of the prejudicial publicity which pervaded the trial atmosphere, the trial court's vapid efforts to insulate the jury from such out-of-court material would be ludicrous, but for their tragic consequences to petitioner and the violence to the concepts of due process and fair trial resulting from such judicial inaction.

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[168] Id. at 9-10.

It is urged that the trial court's ineffectual admonitions to the jury and/or its failure to sequester the jury upon the showing of prejudicial publicity in the instant case was such abuse of the court's discretion in these matters as to demonstrate constitutional infirmity.

Review of the court's cautionary instructions to the jury on the subject of publicity is instructive.

First Day of Trial:

On the day the trial began, the court instructed the jurors not to talk with others or among themselves about the case. *There was no caution against exposure to news media.*[169]

Second Day of Trial:

On the second day, when the jury had been sworn (and after the Andrews broadcast) the court reminded the jurors not to talk about the case and *suggested that since it was possible to physically refrain from reading newspapers and viewing broadcasts,* the jurors ought to "resist the temptation" so to do. There was no *mandate* that news media be avoided.[170]

Third Day of Trial:

On the third day of trial there was a reminder that the jury must not talk about the case; *no mention was made of the news media.*[171]

Fourth Day of Trial:

On the fourth day of trial—the day that Ruf turned up dead, and interrogation of the panel was denied—the court cautioned the jury again about talking, and urged

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[169] R. 250a.

[170] R. 332a-334a.

[171] R. 418a.

that *"as far as it is humanly possible, we are all human, resist any reading about the case." No caution was given as to exposure to radio or television broadcasts.*[172]

Fifth Day of Trial:

On the fifth day of trial the jury was cautioned not to talk about the case and *"as far as it is humanly possible, avoid any newspaper information or radio or television information."*[173]

Sixth Day of Trial:

On the sixth day of trial the standard caution about talking was given, but *no mention was made of the news media.*[174]

Seventh Day of Trial:

When the court charged the jury, *no caution whatever was given as to disregarding information received by the jurors through news media;* this was so even though the court had said, when refusing to question the jury on the matter of Ruf's death, that the matter would be taken care of when the case was finally submitted to the jurors.[175]

It will be observed that the judge's instructions to the jury never took the form of *absolute prohibition* of exposure to news media treatment of the trial and its principals; rather, the court requested, in friendly and forgiving fashion, that the jurors make an *attempt* to avoid exposure as much as was "humanly possible," and then forgave them in advance for any subsequent transgressions which might occur by acknowledging that "we are

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[172] R. 452a.

[173] R. 578a.

[174] R. 589a.

[175] R. 422a.

all human." [176] And even these apologetic instructions were given only on the second, fourth and fifth days of trial; on the other days, including the critical first day when Ruf's disappearance was noted, the equally critical third day, on the evening of which Ruf's death was publicized, and the vital last day when the court gave its general charge to the jury, the court deemed it unnecessary to mention the jurors' obligation to avoid and/or disregard news media publicity, although it demonstrated that it knew how to give absolute daily commands with reference to "talking about the case."

Under the federal rule, the trial court has an absolute duty to *order*—not to cajole or persuade—the jurors not to read, view or listen to any newspaper, television or radio material bearing on the trial.[177]

While "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction" [178] it seems apparent that such sophisticated recognition of human imperfection on the jury should not preclude the attempt, by judicial command, to insulate the jury from adverse extrajudicial information.

Other measures, in addition to prohibitive admonition to the jury, were available to the trial court to immunize the trier of fact from contamination. Under the continuing threat of further sensational developments in the mysterious disappearance of key-witness Ruf, the trial court might well have exercised the power it clearly pos-

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[176] This truism may be amended slightly, in the judge's case, to note that some are more human than others. See argument II, regarding judicial bias, *infra*, pp. 43-57.

[177] *Coppedge v. United States*, 272 F. 2d 504 (D. C. Cir. 1959); *Schoeneman v. United States*, 317 F. 2d 173 (D. C. Cir. 1963); *Carter v. United States*, 252 F. 2d 608 (D. C. Cir. 1958).

[178] *Krulewitch v. United States*, 336 U. S. 440, 453 (1949).

sessed to sequester the jury to guard it against outside influence.[179] It is apparent that the federal requirement that the trial court actively protect the impartiality of the jury against contaminating outside influences by strict judicial instructions to and/or sequestration of, the jury is a constitutional imperative as well as a rule of federal criminal procedure. Petitioner urges this Court to grant certiorari in this case to enunciate the rule clearly so that it may be effectively applied in state criminal proceedings as well as in federal courts.

II.

BIAS OF THE TRIAL JUDGE AGAINST THE PETITIONER DEPRIVED HIM OF A FAIR TRIAL BEFORE AN IMPARTIAL JUDGE.

In this portion of his petition for certiorari, petitioner will demonstrate that (A) the trial judge, having succumbed to the same toxic publicity which infected the jury, was intensely biased against the petitioner, and (B) the conduct of the judge in controlling the trial reflected the damaging and prejudicial effect of this judicial bias, decisively affecting the outcome of the trial and preventing the petitioner from having a fair hearing. Since the same instances of judicial conduct often illustrate both bias and prejudicial effect, i.e. interrogation of witnesses from the bench with leading questions eliciting damaging irrelevant testimony,[180] the examples illustrating bias selected for inclusion in part A of this section, and the examples of

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[179] Ohio Rev. Code § 2945.31; *United States v. Holovachka*, 314 F. 2d 345 (7th Cir. 1963), *cert. denied*, 374 U. S. 809 (1963); *Baker v. Hudspeth*, 129 F. 2d 779 (10th Cir. 1942) *cert. denied* 317 U. S. 681 (1942); *Stone v. United States*, 113 F. 2d 70 (6th Cir. 1940). And see dissenting opinion of Edwards, J. in *Sheppard v. Maxwell*, 346 F. 2d 707 (6th Cir. 1965), reversed 384 U. S. 333 (1966).

[180] R. 358a, 362a.

prejudicial effect in part B, can all be viewed cumulatively as demonstrating that the conviction of the petitioner was compelled by the judge's biased conduct.

In *Sheppard v. Maxwell,*[181] this Court regarded it unnecessary to decide that Sheppard should be released "on the ground that the judge's bias infected the entire trial."[182] The instant case clearly demonstrates the pernicious effect of massive prejudicial publicity on a trial court, and the importance of an unbiased trial judge to a fair trial. Certiorari should be granted to extend the principles enunciated in *Sheppard* to require the trial judge to insulate himself, as well as the jury, from the effects of prejudicial publicity, to set forth standards of judicial conduct minimizing the possibility of prejudice resulting from judicial partiality in notorious criminal cases, and to make it clear that a conviction which is the product of a criminal trial tainted by unfair conduct of a judge whose impartiality has been destroyed by massive publicity will be struck down as contrary to the commands of the Sixth and Fourteenth Amendments.

"No matter what the evidence was against [the petitioner] * * * he had the right to have an impartial judge." [183] "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." [184] Constitutionally fatal bias may exist

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[181] 384 U. S. 333 (1966).

[182] Id. at 358. The Court noted, however, that the judge and the prosecutor were candidates in current judicial elections and suggested the efficacy of a continuance to obviate this element of unfairness. *Id.* at fn. 11.

[183] *Tumey v. Ohio,* 273 U. S. 510, 535 (1927).

[184] *Re Murchison,* 349 U. S. 133, 136 (1955).

where the judge calls upon knowledge obtained elsewhere than in open hearing "and his judgment is based in part on this impression, the accuracy of which could not be tested by adequate cross examination." [185]

A. The Trial Judge Was Biased Against the Petitioner.

The record in this case amply demonstrates that the trial judge, as well as the jury, was prejudicially infected by the poisonous massive publicity which preceded and accompanied the trial. His belief in petitioner's guilt was evident from the *voir dire* through the concluding charge to the jury, and tainted his rulings at every stage.

Between the first and second days of the *voir dire*, as described above, a television broadcast publicized a statement attributing responsibility for Ruf's disappearance directly or indirectly to the petitioner. The next morning, during the course of refusing to review the broadcast for prejudicial content,[186] the judge commented

> "The Prosecuting Attorney may want * * * [Ruf] as a witness. It is their misfortune. That helps your client maybe, rather than hurts him." [187]

This assumption—that the suppression of key first-hand testimony would inure to the petitioner's benefit—made before hearing any evidence, and before the prosecution had even announced an intention to call Ruf to testify against the petitioner, was a clear expression of the trial judge's prejudgment of petitioner's guilt.

During other phases of the proceedings, the trial judge found other occasions to remark upon the defendant's guilt. Although no evidence of transactions other than

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[185] *Id.* at 138.

[186] R. 252a.

[187] R. 253a.

the two charged in the indictment had been presented, defense counsel's assertion that if the state failed to prove a public sale it would not have established a *corpus delicti*[188] was met with the following response from the bench:

> "If I hadn't cut you too short, we would have found out that there were apparently hundreds of sales to the public directed by Mr. Stickler and through numerous parties." [189]

The judge's bias was demonstrated by his evident discomfort, evasiveness and inconsistency on the subject of the prejudicial publicity. His initial reaction to information that a prejudicial broadcast had been made was a confused denial of knowledge about it or ability to control it, and deprecation of any possible prejudice:

> "The Court: Well, we started out here that you couldn't get a fair trial, and I have never had a panel so far who was totally indifferent to any publicity that they might have seen. We haven't had even a hint of any of this panel that they are going to be influenced. This Court can't control what goes on. I didn't see it. I don't know anything about it. I haven't a television set, so I wouldn't be aware of it." [190]

When requested to review a tape of the broadcast he replied

> "No, I can't see it. If the Court would permit things like that, we could easily exonerate defendants by getting somebody to make derogatory remarks. I have nothing to do with that." [191]

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[188] R. 390a.

[189] *Ibid.* The judge's belief in the existence of hundreds of sales *to the public per se* amounted to rejection of petitioner's defense.

[190] R. 252a.

[191] *Ibid.*

Although he refused to examine the broadcast tape, the trial judge permitted a limited general interrogation of the jurors *en banc*,[192] as to whether they had seen the broadcast and were influenced by it. Even this concession was made with the consent of the prosecutor.[193] He refused, however, to allow the question to be asked of the jurors individually,[194] and permitted individual questioning of only those jurors who responded to the questioning of the entire panel *en banc*.

One of the three jurors who admitted seeing the broadcast[195] acknowledged having been influenced and was dismissed for cause.[196] Despite the admission of the second exposed juror that

> "as far as either television or newspaper influencing people, to a certain extent I think it does. I think it does everybody" [197]

and

> "* * * I may have formed an opinion. I don't know" [198]

the judge denied a defense challenge for cause.[199] This juror was peremptorily removed by the defense.[200]

The third panel member who admitted exposure to television denied having been influenced and remained on the jury.[201] Later, the judge refused to permit introduc-

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[192] R. 254a.
[193] *Ibid.*
[194] R. 255a.
[195] R. 255a.
[196] R. 256a-57a.
[197] R. 262a.
[198] R. 263a.
[199] R. 264a.
[200] R. 270a.
[201] R. 274a-79a.

tion of a broadcast tape which defense counsel offered for the record to preserve the issue of prejudicial publicity,[202] *basing his refusal on recollection that "there is no one on this present jury who heard it * * *."*[203] The remaining exposed panelist immediately interrupted to remind the judge that he had heard the broadcast,[204] whereupon the following exchange occurred:

> "[Defense Counsel]: That's right, there is a juror on there that heard it, your Honor."
>
> "The Court: Well, I had forgotten about it. *I will still overrule your motion.*"[205]

While the judge regarded publicity injected by other counsel to the prejudice of the petitioner as not "really before" the court,[206] and felt that such publicity would not "prejudice the Defendant in any way with any sensible juror * * *"[207] his view of publicity which might prejudice the state was another matter, and he found no impediment to chastising defense counsel for making statements that the petitioner was in fear for his life:

> "* * * I think it is very improper * * *. I believe [defense] counsel, at least, ought to be careful not to make statements which are tempting to the jury to read, in spite of the caution. They are human beings."[208]

In a similar vein, when Ruf's body was found and the fact of his death received intensive coverage in the newspapers and other media, defense counsel's request that the

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[202] R. 301a-02a.

[203] R. 303a.

[204] *Ibid.*

[205] *Ibid.*

[206] R. 254a.

[207] *Ibid.*

[208] R. 420a.

jury be reinterrogated as to the effect of such publicity was met with a response from the bench that displayed the court's unreasoned and agitated attitude toward this subject:

> "The Court: That is overruled instantly. That is overruled instantly. I cannot, without some evidence that the jury, some evidence which appears without requestioning, allow that. I never heard of that. That is assuming the jury has violated the caution of the Court, and I cannot assume that and give you the privilege of doing that and compel the prosecutor's office to overcome the presumption. * * *" [209]

Exactly how the judge expected the defense to acquire such extraneous evidence is undisclosed. However, the "caution of the Court" in which the judge invested so much confidence was curiously apologetic and half-hearted:

> "Of course, the Court cannot, except in very unusual circumstances control the news, either in newspapers or in television broadcasts, or radio broadcasts. All of those institutions, of course, know that they have certain limits upon what they can publish and how they can publish it, but unless they violate those restrictions, this Court has no control over the newspapers[210] and, neither has this Court any control over

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[209] R. 422a. After the judge's experience with earlier publicity attending Ruf's disappearance, one might wonder whether his adamance in overruling the motion "instantly" was motivated, consciously or unconsciously, by desire to prevent a juror from again interrupting to supply the evidence of contamination. It is also significant that on this occasion, the prosecution did not consent to reinterrogation.

[210] Similar reference to lack of control of the media appears in a subsequent admonition (R. 332-33a). As the proceedings dragged on, the court's admonition became increasingly cryptic, and sometimes omitted any reference to avoiding newspapers and broadcasts. For example, see R. 310a-11a; R. 525a-26a; R. 577a-78a. On one occasion, the court released the jury over the weekend without a word of caution against publicity. R. 589a.

what you watch or read, except—and particularly on radio—you hardly know what is coming on until you hear it. But this Court will caution you, as long as you are a prospective juror, if you become a juror, refrain, as far as it is possible, humanly possible, from either listening to the radio or television broadcasts or reading the newspaper, any article that concerns this case * * *." [211]

* * *

"And as far as it is humanly possible, *we are all human,* resist any reading about the case * * *." [212]

While lack of a television set prevented the judge from seeing the broadcasts which the defense claimed to be prejudicial, the judge later admitted having "accidentally" seen the petitioner on television during the proceedings.[213]

Judicial bias was also reflected in an unconscionably discriminatory attitude toward the questioning and testimony of witnesses. During the cross-examination of the petitioner, the judge permitted extreme latitude to the prosecution, overruling objections to questioning the petitioner on such completely irrelevant topics as the cost of furnishings in his law office[214] and his holding a party there.[215] Over objection, the judge permitted cross-examination calculated to prove that petitioner was an embezzler.[216] He reprimanded defense counsel for objecting to the prosecutor's argumentative conduct.[217] On a single occasion when the petitioner protested a particularly

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[211] R. 264a-65a.

[212] R. 452a-53a (Emphasis supplied).

[213] R. 419a. He also, at this point, admitted having heard "rumors" that Ruf would turn up dead. *Ibid.*

[214] R. 560a-65a.

[215] R. 566a.

[216] R. 566a-76a.

[217] R. 564a.

argumentative question, the judge rebuked him sharply, saying "Mister, you are a witness only." [218]

On the other hand, during the prosecution's case in chief, the trial judge denied defense counsel any latitude whatever in cross-examination as to the nature of transactions which were the subjects of direct examination,[219] foreclosing inquiries which were crucial to the defense.[220] Even more perniciously, the judge interrupted defense counsel during cross-examination and usurped the interrogation himself[221]—not sparingly in the interest of clarifying vague answers, within the sound discretion of the court—but to assume the role of an advocate, rehabilitating state's witnesses along the lines of the prosecution's theories with leading questions.[222] Often, during his questioning, the judge paraphrased the testimony of the witness with more incriminating language of his own, and led the witness to agree that the paraphrased thought was what he really meant.[223]

Though quick to prevent damaging testimony from prejudicing the state's case,[224] when a prosecution witness non-responsively testified, in the presence of the jury, that he feared further involvement with the petitioner would result in his meeting the same fate as Ruf,[225] the judge

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[218] R. 565a.

[219] R. 358a, 366a, 367a-70a, 370a, 412a, 439a.

[220] Such as whether the petitioner's lender expected any return other than the face value of a promissory note plus interest. R. 374a.

[221] "Excessive injection of the trial judge into the examination of witnesses" was condemned in *Peckham v. United States*, 210 F. 2d 693, 702 (D. C. Cir. 1953) with the approval of this Court in *Offutt v. United States*, 348 U. S. 11, 16-17 (1954).

[222] R. 358a, 362a, 371a-72a.

[223] R. 369a-70a.

[224] R. 382a.

[225] R. 451a.

refused to consider the matter for mistrial.[226] At first denying that he had heard the remark,[227] the judge blamed the defense for having brought the matter out by having examined the witness on the same general subject.[228]

The lengthy record of this case is replete with such instances of the application of this judicial double-standard. The cumulative effect of these rulings (as will be amplified in the following part of this section) is compelling evidence that in the hands of the trial court the scales of justice were overbalanced toward conviction.

B. Judicial Bias Affected the Result of Petitioner's Trial.

Although much note has been taken of the prejudice inherent in a contaminated jury, there has been little attention to the impossible plight of a defendant who must try his case to a judge who has been poisoned by publicity. Often, the effects of judicial bias are subtle and elusive. "A printed record cannot reveal inflections and gestures, the tenor of a judge's conduct of a trial—matters which make his position the most responsible in the daily administration of a fair judicial system * * *." [229] Nevertheless, "to deny that bludgeoning or poisonous comment has power to influence or at least to disturb, the task of judging is to play make believe and to assume that men in gowns are angels." [230]

There is nothing subtle or elusive about the effect which judicial bias had upon the result in this case. The

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[226] R. 452a.

[227] *Ibid.*

[228] *Ibid.*

[229] *Fisher v. Pace,* 336 U. S. 155, 168 (1949) (Murphy, J., dissenting).

[230] *Pennekamp v. Florida,* 328 U. S. 331, 359 (1946) (concurring opinion).

judge emasculated the defense examination of witnesses,[231] and overruled about ninety-eight per cent of defense counsel's objections and motions.[232] In some instances these rulings were not merely questionable, a stretching of discretion, or even plain error; they amounted to independent abridgements of the constitutional right to a fair trial. Several instances require special comment.

At a time when defense counsel was busily engaged in other proceedings engendered by the petitioner's affairs,[233] the petitioner was arraigned on fifteen indictments.[234] Despite defense requests for a continuance, trial was scheduled for thirty days thereafter.[235] No indictment having been specifically scheduled for trial, defense counsel began preparation for trial of the indictment bearing the lowest number.[236] Eight days before the trial date, a prosecuting attorney notified defense counsel that he was not going to trial on the lowest numbered indictment,[237] and two days before trial, another assistant prosecutor from the same office notified defense counsel that he would be expected to try another case for a different client commencing on the day before the scheduled trial in the case at bar.[238] When defense counsel appeared for trial in this unrelated case, the assistant prosecutor refused to go forward, claiming to be unready,[239] thus leaving the scheduled trial date open in this case. Despite defense counsel's

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[231] See pp. 50-51, *supra*.

[232] As pointed out in the Cincinnati Enquirer of June 22, 1961. R. 129a.

[233] R. 13a.

[234] R. 14a.

[235] *Ibid.*

[236] *Ibid.*

[237] *Ibid.*

[238] R. 15a.

[239] *Ibid.*

protests that he was not ready,[240] and despite the strong inference that he had been tricked into proceeding without an opportunity for full preparation, defense counsel's motion for even a single brief continuance was denied,[241] thus depriving petitioner of effective assistance of counsel.[242]

Even more flagrantly, the trial judge virtually directed a verdict against the petitioner on charges for which he had not been indicted. Although each count of the indictment was limited to selling "a security, to wit: a written instrument evidencing a promise to pay money," [243] in the middle of the trial the prosecution determined to add another arrow to its quiver by injecting the theory that the ostensible promissory notes were really investment contracts. As investment contracts the notes would be ineligible for the exemption available to private transactions in promissory notes under Ohio law.[244] Over defense counsel's protest that such was not "the indictment in this case," [245] the judge agreed with the prosecutor,[246] and later charged the jury to find the petitioner guilty if, in effect, it determined the transactions to be private dealings in investment contracts.[247] This after having led the prosecution witnesses to testify to the investment character of the arrangements with his own leading questions, suggesting to the witnesses that the lender was "sharing" with the petitioner [248] and expected the source of repayment

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[240] *Ibid.*

[241] *Ibid.*; R. 307a-09a.

[242] *Powell v. Alabama*, 287 U. S. 45, 71 (1932).

[243] R. 15a-16a.

[244] R. 389a. Ohio Rev. Code § 1707.02 (G).

[245] R. 390a.

[246] R. 389a-90a.

[247] R. 632a, 634a, 636a.

[248] R. 358a, 380a.

to be petitioner's profits.[249] In this fashion, the jury was invited, if not instructed, to find the petitioner guilty of a crime with which he had never been charged, in violation of the Sixth and Fourteenth Amendments.[250]

With similar effect, the judge altered the law to fit the facts adduced by the prosecution. The Ohio statutes under which petitioner was charged exempt "commercial papers and promissory notes * * * when they are not offered directly or indirectly for sale to the public."[251] However, the judge's charge to the jury limited this exemption to such papers and notes only "if sold in a *bona fide* way, i.e. in good faith in the ordinary course of *legitimate* business or borrowing."[252] The accused had consistently maintained that the large return on the notes represented *usurious* interest demanded by the lender.[253] By inserting the elements of "bona fides" and "legitimate business," the court invited the jury to determine that in view of the usurious nature of the interest charged by the *lender*, as well as in view of the various irrelevant allegations of fraud and embezzlement which had been injected, the notes were not given in a bona fide way, or in the ordinary course of a legitimate transaction, and hence, not exempt even though they had not been offered to the public.

Similarly, the charge to the jury also enlarged the concept of "sale to the public," as set forth in the statute, to include any such instrument "if it was of a *character* which was open to common or general participation by any

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[249] R. 362a.

[250] *Cole v. Arkansas*, 333 U. S. 196 (1948); *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939); *cf. Bartell v. United States*, 227 U. S. 427 (1913).

[251] Ohio Rev. Code § 1707.02 (G).

[252] R. 635a (Emphasis supplied).

[253] R. 379a, 544a.

person * * *,"[254] thus stretching the criminal provisions of the blue-sky law to reach private dealings in notes if the notes were of a kind which might, in some other transaction, have been offered to the public.[255]

No Ohio case law supported either of these judicial amendments of the penal law.[256] The judge, in his apparent concern that the Ohio Securities Act might be inadequate to punish petitioner's conduct, engrafted language from the dissimilar California Blue Sky Law[257] which suited him better. The application of this enlarged charge to the statute and indictment under which petitioner was tried denied him his right to be apprised of the nature and cause of the accusation against him.[258] Moreover, by carefully tailoring his judicial modifications of the law to fit the evidence against the petitioner as it emerged during the trial, the judge virtually directed a guilty verdict.

Other rulings of the trial judge also illustrate the damaging effect of his bias. Some of these, including his denial of motions for a change of venue, mistrial and interrogation of the jurors, have been discussed in detail in connection with publicity.[259] Other damaging rulings include permitting the introduction of testimony tending to in-

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[254] R. 635a (Emphasis supplied).

[255] It is difficult to envision a form of note which would not meet this test. In fact, the notes in question were ordinary cognovit notes of a kind almost only used for ordinary borrowing, rather than bonds of a sort used in public debt-security dealings. See notes reproduced in Appendix C, pp. 13a-14a.

[256] Ohio criminal law is entirely statutory; the statutes must be strictly construed and may not be judicially enlarged. *State v. Channer*, 115 Ohio St. 350 (1926); *State v. Meyers*, 56 Ohio St. 340 (1897).

[257] Deering's Calif. Code Annot. § 25102(b).

[258] *Lanzetta v. New Jersey*, 306 U. S. 451, 456 (1939).

[259] See pp. 24 through 39, *supra*.

ject collateral transactions of a prejudicial nature,[260] including alleged misrepresentations for which petitioner was not under indictment in this case,[261] the overruling of motions for dismissal,[262] and permitting the prosecutor to make prejudicial accusations of fraud and embezzlement against the accused in his opening statement[263] and final argument.[264]

In each of the instances described above an unbiased judge might well have ruled for the defense. Certainly an unbiased judge would not have ruled against the defense in every such instance. The record unmistakably demonstrates that though the petitioner entered the ring to do battle with the prosecution, he was sandbagged by the referee. Petitioner calls upon this Court to grant certiorari in this case in order to make clear that the impartiality of judges as well as juries may be contaminated by extrajudicial publicity in notorious criminal trials,[265] and to articulate guidelines of judicial conduct in such cases which will minimize the opportunity for a biased judge to abuse his obligation to protect the accused from the noxious consequences of trial publicity.

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[260] R. 393a. Requested instructions miting the purposes for which such testimony might be received were denied. *Ibid.*

[261] R. 350a, 372a, 394a, 431a, 457a.

[262] R. 388a-90a, 527a, 589a.

[263] R. 324a-25a.

[264] R. 619a.

[265] A point this Court found unnecessary to consider in *Sheppard.*

III.

THE PETITIONER'S CONVICTION PREDICATED UPON PERJURED TESTIMONY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner's conviction was fatally contaminated by the prosecution's use of perjured testimony in connection with an essential element of the charges against him.

Because the security violation charges could have been defeated by a showing that petitioner had not offered the promissory notes in question for sale to the public,[266] it was critical for the defense to demonstrate that petitioner had not solicited the public for loans evidenced by his promissory notes. The prosecution attempted to prove that the petitioner had offered certain promissory notes to the "general public" by calling seven witnesses who had purchased similar notes. All but one, Patrick Sestito, testified that they had learned of the petitioner's commercial activities only through personal contact with him.[267] Sestito claimed to have learned of petitioner's money lending activities through the "grapevine," and specifically denied having obtained this knowledge from Edgar Shott, an attorney who had known and had business dealings with petitioner over a long period of time:

> "Q. On direct examination you said you heard something through the grapevine. You made that statement, didn't you?
>
> A. Yes sir. I did.
>
> Q. Your grapevine was Shott, wasn't it?
>
> A. *No, sir, it wasn't. It definitely was not.*" [268]

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[266] Ohio Rev. Code § 1707.02 (G) provides an exemption from registration of "commercial papers and promissory notes * * * *when they are not offered directly or indirectly for sale to the public.*" (Emphasis supplied.)

[267] See the testimony of Shapiro, R. 392a-393a; Morrisey, R. 427a; Winters, R. 434a; Fidler, R. 478a; Mondor, R. 484a; and Katman, R. 496a.

[268] R. 465a; See also R. 457a-463a.

Sestito's was the only evidence in the trial of a public solicitation by petitioner.

Barely a week later,[269] however, when the state again called Sestito as a witness in the prosecution of Shott, he admitted, under oath, that he had been introduced to petitioner by Shott,[270] and not via the "grapevine" or any other public means.

It is uncontradicted that Sestito deliberately perjured his testimony in petitioner's trial in consideration of Shott's promise of monetary repayment for making petitioner "the goat in the whole situation,"[271] that Shott had attempted to suborn the perjury of other witnesses for similar ends,[272] and that not later than one week after petitioner's conviction the prosecution must have learned—if it did not already know—that Sestito's testimony in petitioner's case had been contradicted by his subsequent admission.[273] At no time then or during the lengthy post-conviction proceedings did the prosecution take any steps to bring the perjury to the attention of a court or correct the injustice, even after the matter was called to its attention by the petitioner. Proof of its latest defiant refusal to correct a conviction tainted by perjured

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[269] R. 35a.

[270] R. 204a. "Q. Pat, let me ask you something. Fifteen or 20 minutes ago, when we were out in the hall, didn't you tell me that you had nothing against Ed Shott, except it was through him you heard about Stickler, and through him you loaned to Stickler, and when you loaned to Stickler, you lost your money?

"Q. Didn't you tell me that out in the hall about 20 minutes ago Pat?" * * *

"A. *Yes.*"

[271] Appendix C, p. 15a.

[272] Appendix C, pp. 16a-17a.

[273] The trial of Edgar Shott a week later was conducted by members of the same prosecutor's office before the same trial bench and involved closely related facts. R. 35a.

evidence is set out in the answer brief of the prosecution in the court below.[274]

In the line of cases beginning with *Mooney v. Holohan*,[275] recently reaffirmed in *Miller v. Pate*,[276] the Supreme Court has recognized the obvious fact that, though the trappings of fair trial may be observed, due process of law has been violated when perjured prosecution testimony has been used to convict the accused. This rule has been applied whether the use of false testimony is deliberate[277] or inadvertent,[278] when the evidence relates to guilt,[279] punishment,[280] or credibility of witnesses,[281] and whether accurate evidence is suppressed or false evidence is presented.[282]

A fatal violation of due process occurs "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." [283] The vitiation of a conviction so obtained is not "punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused," [284] and thus applies "irrespective of the good faith or bad faith of the prosecution." [285]

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[274] "Appellant accuses the State of suborning perjury. This accusation is unfit of reply." Brief of Appellee, Sixth Circuit Court of Appeals, page 10.

[275] 294 U. S. 103 (1935).

[276] ___ U. S. ___ 35 L. W. 4179 (February 13, 1967).

[277] *Pyle v. Kansas*, 317 U. S. 213 (1942).

[278] *Brady v. Maryland*, 373 U. S. 83 (1963).

[279] *Mooney v. Holohan, supra.*

[280] *Brady v. Maryland, supra.*

[281] *Napue v. Illinois*, 360 U. S. 264 (1959).

[282] *Brady v. Maryland, supra; Alcorta v. Texas*, 355 U. S. 28 (1957).

[283] *Napue v. Illinois*, 360 U. S. 264, 269 (1959).

[284] *Brady v. Maryland*, 373 U. S. 83, 87 (1963).

[285] *Ibid.*

Although the Court has not yet held as a matter of Fourteenth Amendment due process that the prosecution must correct the results of perjured prosecution testimony when it did not become aware that the prosecution testimony was perjured until after the trial, the necessity of such a rule has been suggested by at least four justices,[286] as well as by the square holding of a federal court of appeals.[287]

At least two cases decided by this Court under its federal supervisory powers have demonstrated that convictions tainted by perjured testimony cannot stand, even where the prosecution was entirely blameless and discovered the falsity of the evidence only after the conclusion of the trial.[288] There is a suspiciously constitutional flavor to the language in these cases, although they are admittedly based upon the Court's federal supervisory powers. For example, consider the following language enunciated by the Chief Justice, speaking for the majority of the Court in *Mesarosh v. United States*: [289]

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
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> * * * * *
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It

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[286] See *Durley v. Mayo*, 351 U. S. 277, 290 (Douglas, J. dissenting).

[287] *Jones v. Kentucky*, 97 F. 2d 335 (6th Cir. 1938).

[288] *Mesarosh v. United States*, 352 U. S. 1 (1956); *Communist Party v. S. A. C. B.*, 351 U. S. 115 (1956).

[289] 352 U. S. 1, 9, 14 (1956).

cannot afford to abide with them. The interests of justice call for a reversal. * * *" [290]

The extension of *Brady v. Maryland,* and its predecessors, to convictions obtained by prosecution testimony whose falsity was discovered by the prosecution after trial ineluctably follows the principles already established by this Court.

If the purpose of ruling perjury-tainted convictions void under the Fourteenth Amendment is indeed the "avoidance of an unfair trial to the accused," [291] irrespective of the "good faith" of the prosecutor,[292] rather than punishment of the state,[293] it is difficult to connect any relevance to the point at which the prosecution becomes aware of the perjury. Moreover, the application of the duty to correct false testimony to inadvertent use of perjured testimony[294] engenders the likelihood that in the overwhelming majority of cases, inadvertently used perjured testimony will not be discovered by the prosecution until after the trial, and the constitutional command will be futile unless so extended.

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[290] And see *Communist Party v. S. A. C. B.*, 351 U. S. 115, 124 (1956):

"If [this Court] has any duty to perform [in its supervisory jurisdiction over federal criminal proceedings], it is to see that the waters of justice are not polluted. * * *

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. * * * [F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." (Bracketed material supplied.)

[291] *Brady v. Maryland,* 373 U. S. 83, 87 (1963).

[292] *Ibid.*

[293] *Ibid.*

[294] *Brady v. Maryland, supra.*

Certiorari should be granted to extend and clarify the rule of *Brady v. Maryland*,[295] to require the prosecution to take affirmative steps to vitiate all convictions based upon perjured testimony, whether prosecution discovers the perjury before, during or after trial.

CONCLUSION.

This case presents the Court with a signal opportunity to fill in the detail, broadly sketched in *Sheppard v. Maxwell*, last term, of the constitutional requirements of a trial judge's responsibility toward the accused in notorious and highly publicized criminal trials. Clarification of the precise kinds of trial and pretrial publicity which will constitutionally compel a continuance, change of venue or mistrial, and the adoption of the tested federal rules of interrogation, admonition and other forms of jury protection against contamination from external news media sources, will achieve several valuable results. Not only would such a course improve the administration of criminal justice, by preventing the need for costly and time-consuming reversals and retrials, but it would assist materially, by providing effective judicial alternatives to the suppression of news comment on criminal trials, in preserving freedom of the independent press from the onslaught of over-zealous trial judges attempting to overimplement this Court's suggestions in *Sheppard*.

Moreover, the record in this case allows the Court an opportunity to clearly recognize what is evident in practice and in the facts of decided cases—that a trial judge's impartiality may suffer the same corrosive effect from prejudicial publicity as that of a panel of jurors, an opportunity to scrutinize judicial behavior under such circum-

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[295] 373 U. S. 83 (1963).

stances with especial care, and to articulate constitutional limits on the trial judge's discretion in protecting the accused against prejudicial publicity, to minimize the effect publicity-biased judges may have upon the outcome of such trials.

Finally, the use by the prosecution of perjured evidence to obtain a conviction in this case presents this Court with a timely and appropriate opportunity to articulate the rule, implicit in the line of cases beginning with *Mooney v. Holohan*, describing the constitutional imperative of fairness of prosecutorial conduct: that a conviction in a trial tainted by prosecution use of perjured evidence is absolutely void as a matter of due process, whether or not the fact of perjury was known to the prosecution at the time such evidence was offered at the trial.

For these reasons, petitioner urges this Court to grant the petition for writ of certiorari, so that his conviction may be reviewed and these important constitutional questions considered.

Respectfully submitted,

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